

## THE CHARACTERIZATION OF A PROCUREMENT PROCESS AS A “CALL OR REQUEST FOR BIDS OR TENDERS” UNDER SECTION 47 OF THE COMPETITION ACT\*

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*Courts have recently recognized that the law of tenders can provide useful indications as to what a “call or request for bids or tenders” should consist in for the purpose of section 47 of the Competition Act. In two preliminary inquiry judgments rendered in Quebec (Al Nashar/Industries Garanties) and Ontario (Dowdall) involving bid-rigging charges, courts have made reference to the contract A/contract B scheme of the law of tenders. They also had to assess the weight of “privilege clauses” (i.e. no obligation upon the owner to accept the lowest bid or any tender submitted) and post-selection negotiations in the characterization of a procurement process as an RFP. This paper aims to review these two decisions, along with other case law rendered under section 47 and the law of tendering, in an attempt to propose basic general criteria and a non-exhaustive set of indicia to determine whether a procurement process is contemplated under section 47 of the Competition Act. In particular, the authors assess the weight of the contract A/contract B paradigm, privilege clauses and negotiations in the characterization of a tendering process as a “call or request for bids or tenders.”*

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*Les tribunaux ont récemment reconnu que le droit des appels d'offres peut fournir des indications utiles afin de déterminer en quoi consiste un « appel ou une demande d'offres ou de soumissions » en vertu de l'art. 47 de la Loi sur la concurrence. Dans deux décisions rendues à l'issue d'enquêtes préliminaires au Québec (Al Nashar/Industries Garanties) et en Ontario (Dowdall) relatives à des accusations de truquage d'offres, les tribunaux ont fait référence à l'analyse du contrat A/contrat B du droit des appels d'offres. Ils ont également eu à évaluer l'incidence, dans la caractérisation d'un processus d'approvisionnement en tant qu'appel d'offres, des « clauses de réserve » (c.-à-d. une disposition ne prévoyant aucune obligation de la part du propriétaire d'accepter l'offre du soumissionnaire le moins-disant ou d'accepter toute soumission) et des négociations suite à la sélection. Le présent article vise à passer en revue ces deux jugements ainsi que d'autres décisions rendues sous l'art. 47 et suivant le droit des appels d'offres, et ce, dans l'optique de proposer des critères de base*

*généraux et une série d'indices non exhaustifs afin de déterminer si un processus d'approvisionnement tombe sous l'égide de l'art. 47 de la Loi sur la concurrence. En particulier, les auteurs évaluent l'incidence du modèle du contrat A et du contrat B, des clauses de réserve et des négociations dans la caractérisation d'un processus d'offres comme étant un « appel ou une demande d'offres ou de soumissions ».*

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## I. Introduction

**T**he *Competition Act*<sup>1</sup> (the “*Act*”) makes it a criminal offence for persons to agree not to submit or to withdraw a bid or tender in response to a “call or request for bids or tenders” (“RFP”) or to present bids or tenders in response to a RFP where such bids or tenders result from an agreement between multiple bidders or tenderers.<sup>2</sup> No offence is committed, however, where a party to such an arrangement either discloses same to the organization which placed the RFP (the “owner”) at or before the time when the bid or tender is submitted or withdrawn,<sup>3</sup> or where the arrangement occurs between bidders who are all affiliates of one another.<sup>4</sup> Section 47 creates a *per se* offence, in that prosecution does not have to prove anti-competitive effects on the Canadian economy, which would generally require expert evidence. The offences under section 47(1) are punishable by a discretionary fine and imprisonment.<sup>5</sup> Where a senior officer of the organization is at fault, the organization’s criminal liability may also be engaged.<sup>6</sup>

In 2009, Parliament amended the Act by increasing the maximum term of imprisonment for an offence under section 47 from 5 to 14 years, thus recognizing the need for more severe penalties for those participating in bid-rigging schemes of significant size and effect. This increased maximum sentence eliminated the possibility of absolute/conditional discharges under section 730 of the *Criminal Code*. Furthermore, with the entry into force of the *Safe Streets and Communities Act*,<sup>7</sup> formerly known as Bill C-10, conditional sentencing is no longer possible for bid-rigging offences committed after November 20, 2012.<sup>8</sup> In light of this tougher sentencing, the Federal Court has observed that “[p]rice fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.”<sup>9</sup>

In recent years, the Competition Bureau has been increasingly aggressive in prosecuting individuals participating in price-fixing and bid-rigging schemes. In the past 5 years, more than 70 persons have been charged under sections 45 and 47 of the *Act*. Since the adoption of the 2009 amendments, such offenders face higher risks of conviction and imprisonment. Recently, a record-setting fine of \$30 million was imposed on a Japanese auto parts maker that pleaded guilty to three counts of bid-rigging under section 47(1)(b).<sup>10</sup> In Quebec, the Competition Bureau has been closely monitoring the allegations made during the “Charbonneau Commission,”<sup>11</sup> a public inquiry into corruption in the management of public construction contracts. The evidence adduced will surely prompt the Bureau to investigate and have criminal proceedings brought against several individuals and corporations alleged to have colluded in obtaining construction contracts from the Quebec Government and municipalities.

Given that the *Act* provides no definition of the phrase “request for bids or tenders,” courts have recently borrowed from the law of contracts and the principles developed in Canadian jurisprudence regarding the law of tenders to assess whether a procurement process is an RFP under section 47. Courts recently had to determine whether the absence of an obligation to accept compliant tenders or the option to negotiate the terms of the final contract could negate the characterization of a procurement as a “request or call for bids or tenders.”

In the recent decision of *R v Dowdall*,<sup>12</sup> the Ontario Court of Appeal confirmed a preliminary inquiry judgment rendered by the Ontario Court of Justice. The preliminary inquiry judge found that there was sufficient evidence adduced to support a finding that federal government RFPs were calls for bids or tenders within the meaning of section 47 of the *Act*. This decision was upheld by the Ontario Superior Court. The Court of Appeal endorsed the Superior Court’s view that “[a] term permitting the party issuing the RFP to retain the discretion not to proceed to call up work or services is but one aspect of the analysis.”<sup>13</sup> The Court held that satisfactory evidence had been presented to ensure that a properly instructed trier of fact would be able to conclude that the appellants had made bids in response to a RFP under section 47.

Interestingly, a seemingly contradictory decision was rendered by the Court of Quebec about two months earlier pursuant to a preliminary

inquiry into bid-rigging having regard to private construction contracts.<sup>14</sup> Despots J.C.Q. noted that no RFP under section 47 exists where no obligation to enter into a contract stems from the submission of a tender or bid (i.e. a simple invitation to negotiate). A privilege clause stipulating that the company requesting tenders had no obligation to accept a bid and testimonies to the effect that contracts were not necessarily awarded to the lowest bidder convinced the Court that a properly instructed jury could not conclude as to the existence of an RFP. The Quebec Superior Court subsequently quashed this decision in April 2014 following the prosecution's successful application of *certiorari*.<sup>15</sup> Vaclair J.S.C. held that the preliminary hearing judge exceeded her jurisdiction by concluding that detailed RFP documentation does not automatically lead to the conclusion that parties intended to enter into "contract A."<sup>16</sup>

This paper aims to review these two decisions, along with prior case law rendered under section 47 and the law of tendering, in an attempt to propose basic general criteria and a non-exhaustive set of indicia to determine whether a procurement process is contemplated under section 47 of the *Act*. Namely, the authors assess the weight of the contract A/contract B paradigm of the law of tenders, privilege clauses and negotiations in the characterization of a tendering process as a "call or request for bids or tenders."

## II. Section 47 of the Competition Act

In general, the purpose of an RFP is to obtain the most competitive proposals for a contract, the essential terms of which the owner has specified, in a structured procurement process designed for his specific needs. Where tenderers collude to arrange their bids, the competitive and economic rationale of the procurement process is largely undermined. As the Ontario High Court of Justice has noted, "[f]ailure to ensure freedom from such conduct can only militate much to the financial and other detriment of society."<sup>17</sup> In the context of civil litigation, the Supreme Court of Canada has reasoned that the logical basis of the tender call process is to replace negotiation between parties by competition,<sup>18</sup> which explains why competition law is interested in regulating RFPs. Section 47 of the *Act* reads as follows:

47. (1) In this section, “bid-rigging” means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

(2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

It should be noted that before 2009, the withdrawal of a tender pursuant to an arrangement with another tenderer did not constitute an offence.<sup>19</sup> Parliament fixed this shortcoming by amending section 47(1) to specifically set out that concluding an arrangement or agreement with another bidder to withdraw a bid already submitted in response to an RFP is an offence. The Ontario High Court of Justice has qualified bid-rigging as “an offence *per se*.”<sup>20</sup> It is incumbent upon the prosecution to demonstrate five elements beyond a reasonable doubt<sup>21</sup> for one to be condemned of bid-rigging charges under section 47:

(1) the existence of an agreement or arrangement between two or more persons;

- (2) entered into intentionally and advertently;<sup>22</sup>
- (3) either not to submit or to withdraw bids or tenders, or to submit pre-arranged bids or tenders;
- (4) in response to a call or request for bids or tenders; and
- (5) without the knowledge of the person calling for or requesting the bids or tenders.

The *Act* uses broad terms so as to encompass a wide range of circumstances and industries within its scope. Bid-rigging committed with respect to either governmental or private RFPs may lead to a conviction under section 47(2). The broad language of section 47 appears necessary to provide enough flexibility to incorporate tender calls entered into in both civil and common law provincial jurisdictions and to adapt to constantly evolving commercial and industry practices. The constitutionality of the criminal offence of bid-rigging has been upheld by the Ontario High Court of Justice having regard to a purported invasion of provincial legislative authority. In *R v Charterways Transportation Ltd.*,<sup>23</sup> DuPont J. held that the offence fell “within the legislative competence of the federal Government to define criminal offences.”<sup>24</sup>

The broad language of section 47 must not, however, be used in ways that could distort the nature of the offence. For bid-rigging to occur, there must be “a direct relationship, or nexus, between the person calling for the bids and tenders and the person submitting the tenders.”<sup>25</sup> Subparagraphs (a) and (b) of section 47(1) provide that the agreement to submit, not to submit or to withdraw must have been “in response” to an RFP. This means, in cases of submission or withdrawal, that the tender or bid must have been sent to the person who had requested the proposals. In *Coastal Glass*,<sup>26</sup> the British Columbia Court of Appeal upheld the acquittal of two subcontractors accused of bid-rigging who had submitted arranged price quotations to candidates for the role of general contractor of a construction project rather than the building developer who had issued the RFP. The industry practice was that the Amalgamated Construction Association of British Columbia would circulate a construction bulletin listing candidates for the role of general contractor who had picked up tender applications for the developer’s RFP. Subcontractors would then submit their price

quotations to the candidates, who would in turn use such quotes in the submission of their sealed bids to the project developer.<sup>27</sup> It appeared that the general contractors had not placed an RFP to obtain quotations from subcontractors, and that the subcontractors had not made a submission in response to the building developer's RFP.

Like several other prohibited practices set out under the *Act*, bid-rigging requires the entering into of an "arrangement" or "agreement" between two or more parties. It is incumbent upon the Crown to demonstrate the mutual arrival at an understanding to rig bids, as the mere accommodation of another bidder may not be sufficient to constitute an arrangement or agreement.<sup>28</sup> However, this does not mean that the prosecution must prove all of the elements necessary for the existence of a contract as understood under the civil or common law. A "meeting of the minds" to rig bids inferred from the circumstances is sufficient to establish that an arrangement or agreement has taken place.<sup>29</sup>

Section 47(1) makes it a defence to notify the owner of the existence of the agreement or arrangement. The Ontario High Court of Justice has observed that bid-rigging fell "within the category of strict liability," in the sense that the notification defence can be available where one has "taken all reasonable care to make the agreement known."<sup>30</sup> It is not a defence to argue that the owner was implicitly notified of the arrangement or agreement, by means of logical inference, following his opening of identical bids or tenders.<sup>31</sup> Express notification is necessary.<sup>32</sup>

One may say that the aspect of section 47 that carries the highest degree of uncertainty is the scope of the phrase "call or request for bids or tenders." Since no definition has been provided for under the *Act*, practitioners and courts have recently relied on the law of tendering to determine whether a bid-rigging offence had been committed.

### III. The Law of Tenders

The principles regarding contract law in respect of RFPs have been well established in six landmark decisions rendered by the Supreme Court of Canada between 1981 and 2010.<sup>33</sup> In *The Queen (Ont) v Ron Engineering*,<sup>34</sup> the Supreme Court recognized for the first time, in conformity with commercial practices, that a preliminary contract can

automatically arise “forthwith and without further formality upon the submission of the tender.”<sup>35</sup> Before *Ron Engineering*, the submission of a tender in response to an RFP could not give rise to an enforceable contract.<sup>36</sup> An advertisement for tenders was generally considered a simple invitation to submit offers to enter into a contract. The person requesting submissions could thus, at its sole discretion, reject or accept any and all offers submitted to its attention and no binding agreement existed until the advertiser accepted an offer.

Since *Ron Engineering*, an RFP is often described as comprising a two-phase contractual relationship, namely a preliminary “contract A” and a final “contract B.” Contract A arises as a result of a compliant tender submission, where it is the intention of the parties to trigger contractual relations. There can be as many valid contracts A as there are valid tenders.<sup>37</sup> In *M.J.B. Enterprises Ltd. v Defence Construction (1951)*,<sup>38</sup> the Supreme Court described the nature of contract A as follows:

[19] What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.<sup>39</sup>

The terms of contract A are variable and specific to each unique RFP. They may be inferred from all germane circumstances, including the terms of the RFP documents, past practice between parties, testimonies or even email correspondence.<sup>40</sup> Custom or industry usage may also be a consideration,<sup>41</sup> but cannot override clear and unambiguous express terms.<sup>42</sup> The mere title or label of a document may constitute an indicator, but it is not the determining factor.<sup>43</sup> The “substance and terms of the contract” are the most relevant indicia.<sup>44</sup> Contract A is governed by both the explicit and implied terms of the tender documents. Implicit terms will exist where the following test has been satisfied:

Contract A may also contain certain implied terms if they meet the test for implied terms set out by this Court in *Canadian Pacific*

*Hotels Ltd. v Bank of Montreal*, [1987] 1 SCR 711: para. 27 of *M.J.B. Enterprises*. Implied terms can be based on the existence of any of: (1) custom; (2) the legal incidents of a particular class or kind of contract; or (3) the presumed intentions of the parties, where the term is necessary to give business efficacy to a contract.<sup>45</sup>

The presentation of a valid bid also consists in an offer to enter into contract B, which is formed upon the owner's formal acceptance of a tenderer's submission. Contract B<sup>46</sup> is the ultimate contract sought to be concluded and performed by the parties as a result of the procurement process (e.g. a construction, supply or service contract).<sup>47</sup> In *Ron Engineering*, the Supreme Court found that the main object of contract A was the irrevocability of the compliant tender. However, this was a fact-specific conclusion. As the Supreme Court later explained in *MJB Enterprises*, contract A may still arise, even where irrevocability is not an express or implied condition of such initial contract. Depending on the terms and conditions of the tender call, contract A and tender irrevocability are not always a consequence of the submission of a tender:

[17] [...] Therefore it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that Ron Engineering suggests otherwise, I decline to follow it.<sup>48</sup>

In *Double N Earthmovers Ltd. v Edmonton (City)*,<sup>49</sup> the Supreme Court provided a succinct summary of the contract A/contract B analysis:

[2] A call for tenders involves a party's (often referred to as the "owner") requesting the submission of bids to complete a particular project. Where the parties intend to initiate contractual relations, a submission in response to a call for tenders can lead to the formation of Contract A. The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted. A bidder accepts that offer by submitting a bid that complies with the requirements set out in the tender documents. The contractual rights and obligations of the parties to Contract A are governed by the express or implied terms of the tender documents.

[3] A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought. Where a bid is accepted, the terms of the tender and bid documents become the terms and conditions of Contract B.<sup>50</sup>

In certain cases, courts have held that the contract A/contract B scheme is not applicable where the procurement process does not give rise to binding contractual relations upon the submission of a tender (i.e. a mere invitation to initiate negotiations). In *Buttcon Ltd. v Toronto Electric Commissioners*,<sup>51</sup> the Ontario Superior Court held that an RFP issued by Toronto Hydro did not give rise to contract A. Among other things, the judge considered the lack of a specified number of locations and the presence of a privilege clause as evidence that there could not have been a contract A.<sup>52</sup> The Court also took into account that two and one-half months were reserved for negotiations of the final contract.<sup>53</sup> Furthermore, the documents provided that tenders were to “be evaluated on how well they [met] the specifications stated in the document,”<sup>54</sup> which the Court interpreted as nothing but a “general instruction.” MacFarland J. ultimately came to the following conclusion:

[49] On the whole of the evidence, I am satisfied that the RFP was exactly that – a request for proposals and nothing more. The prize at the end of the exercise was, for the successful proponent, the opportunity to negotiate for a contract to build the services centre. There was no intention by the issuance of this document to create contractual relations, and Contract A did not arise on the facts here presented. Consequently, the plaintiffs have no claim for breach of contract in the circumstances.<sup>55</sup>

In *Mellco Developments Ltd. v Portage la Prairie (City)*,<sup>56</sup> the Manitoba Court of Appeal gave similar reasons:

[73] When these principles are applied to the facts before us, I have no difficulty in concluding that the RFP was not intended to create a binding contractual relationship between the city and the “winning bidder.” A simple examination of para. 4.2 of the RFP (see para. 6 of these reasons) provides many examples of the city’s intention to negotiate rather than to enter into a binding agreement with the successful proponent. [...] The fact that the proposal reads in para. 4.2-1 that “[T]his is an invitation

for proposals and not a tender call” is not a statement made in isolation. It is but one of the many factors militating against the applicability of *Ron Engineering* on the facts before us.

[74] As we have seen, where the final terms of the contract are contained in the bid (i.e. there is no need for negotiation), courts will readily find a valid tender and not a mere invitation to treat. [...] But these are not the facts before us. It is not possible to identify the terms of any Contract B. As set forth in the RFP, subsequent discussions and negotiations were required respecting fundamental detail. Cases such as this do not fall to be decided under the law of tenders as articulated in *Ron Engineering*.<sup>57</sup>

Finally, it should be noted that the contract A/contract B framework is not a strict framework that is mechanically imposed by courts in contractual liability disputes. Its purpose is to provide an explanation of the legal relationship that arises between parties to a procurement process. As the Supreme Court held in *Tercon Contractors*, this scheme “is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties’ actual dealings.”<sup>58</sup>

#### **IV. Characterization of RFPs under Section. 47 of the Act**

##### **1. *R v Dowdall***

In 2005, Public Works and Government Services Canada (“PWGSC”) contacted the Competition Bureau about suspected bid-rigging for Government of Canada contracts. On February 17, 2009, the Competition Bureau announced the bringing of criminal charges against information technology and software consultants operating in the Ottawa region for alleged bid-rigging and conspiracy to commit bid-rigging for ten requests for proposals for IT services.<sup>59</sup> The Competition Bureau indicated that it had found that the accused companies “secretly agreed in advance on the technical and financial proposals they would submit.”<sup>60</sup>

Eight of the RFPs had been issued by the Canada Border Services Agency (“CBSA”), while the other two were respectively placed by Canada On-Line Services (“COS”) and Transport Canada (“TC”). The CBSA and COS RFPs were both managed by PWGSC and thus were

very similar. The TC RFP shared some characteristics with the COS and CBSA RFPs, but was managed by TC and drafted differently.

The accused, including both companies and individuals, opted for a preliminary inquiry. Alder J. of the Ontario Court of Justice concluded that the case should go to trial, holding that the Crown had adduced sufficient evidence to demonstrate that all ten RFPs fell under section 47 of the *Act*. This decision was confirmed by both the Superior Court and the Court of Appeal. The Supreme Court refused to grant leave to appeal the Court of Appeal's decision.<sup>61</sup>

In their appeal, the accused argued that Alder J. had committed a jurisdictional error in its preliminary inquiry judgment by concluding that there was sufficient evidence to conclude that the RFPs were calls or requests for bids or tenders under section 47 of the *Act*.

All the RFPs set out a standardized set of terms and conditions, along with a tendering process. Successful tenderers entered into a contract with the government agency for the provision of services for a certain term. Upon the expiry of their terms, the contracts provided for the possibility of "task authorization" and "task requisition" mechanisms, which would allow the agencies to request work on an as and when requested basis. Accordingly, the government agencies could create "a list of pre-approved suppliers [...] who could be issued with task authorizations (or the equivalent) if and when TC or PWGSC decided they required such services."<sup>62</sup>

Following an analysis of terms and conditions of the RFPs, testimonies and email exchanges, the preliminary inquiry judge found that there were sufficient contractual indicia for a properly instructed jury reasonably to conclude that all ten RFPs fell under section 47 of the *Act* and that the accused should thus stand trial. She referred to the contract A/contract B structure of the jurisprudence on the law of tenders to reach the preliminary conclusion that the dealings between the agencies and the accused could be part of a "call or request for bids or tenders." The Court noted that "acceptance of the proposal resulted in contractual obligations for both parties."<sup>63</sup> To come to that conclusion, Alder J. reviewed both the terms and conditions of the tender documents and the circumstances which surrounded the procurement process.

For the CBSA RFPs, she found that the email correspondence between the parties demonstrated their intent to enter into RFPs and noted that the task authorizations were “complex, detailed requests by the government to pre-qualified companies to submit proposals, in accordance with clearly defined requirements.”<sup>64</sup> Among other things, the judge took into account the anonymity of the process (the tendering authority could not communicate with tenderers). She also noted that “[t]he ‘winners’ did receive a contract for services albeit one that required a further step (i.e. task authorisation)”<sup>65</sup> and that “the resulting contract terms mirrored those of the RFPs.”<sup>66</sup>

With respect to the TC RFP, the Court went into less detail. It noted the presence of some competing evidence, but nonetheless decided that charges of bid-rigging should be allowed to go to trial:

[88] [...] numerous terms including proposals, bids, tenders, offers. It does however clearly state that by submitting a proposal the “bidder” for lack of a better word is offering to enter into a contract with Her Majesty on the terms set out therein. [...]

[89] While there is evidence to suggest this RFP is not a request for bid or tender and the proposals not bids or tenders there is nevertheless some evidence from which an inference could be made that they are. Given that it is not for this court to weigh competing inferences and where there are competing inferences, the most favourable for the crown must prevail I find there is some evidence that the Transport Canada RFP is a request for bid or tender and the submissions are bids and tenders.<sup>67</sup>

The accused filed for *certiorari* in order to quash the Court of Justice’s decision. After a review of commercial case law, the Superior Court made a distinction between non-binding invitations to negotiate and RFPs.<sup>68</sup> Hackland J. described the main issue as follows:

[30] In my opinion, the central question in the present application is whether the preliminary inquiry judge was precluded from finding that the evidence could support the existence of a tendering contract (Contract A) on the basis that there was no certainty of a Contract B (the actual call up or engagement of I.T. services) coming into existence.<sup>69</sup>

The Court observed that the task authorization/task requisition process “would trigger a secondary bidding process among the approved suppliers” for which the agencies had “no obligation to utilize any services from the approved suppliers.”<sup>70</sup> Justice Hackland found that the lower court “was correct in her finding that the many contractual indicia [...] are sufficient to potentially characterize this procurement process as creating a bidding contract.”<sup>71</sup> The Court ultimately held that the task authorization mechanism, whereby there was no guarantee that the services of the accused companies would be retained, was only one aspect of the analysis to determine whether there is an RFP as per section 47:

[39] The applicants’ position is that, in circumstances where the fundamental nature or goal of the procurement process is merely to create a list of potential qualified suppliers with no specific or clearly identified project nor commitment to engage any services at all, any proposals to obtain such work are simply proposals and not contractual bids or tenders. They argue with some force that, without the likelihood of a Contract B as discussed in the jurisprudence, there is no Contract A and any proposals furnished in a procurement process structured in that manner are not bids or tenders within s. 47(2) of the *Competition Act*. I respectfully disagree with this submission. The controlling appellate jurisprudence requires the court to make a finding as to whether the parties intended a contract in the sense of creating binding rights and obligations with respect to the procurement process. Such an intention is to be inferred from the terms of the RFP and all other relevant circumstances. A term permitting the party issuing the RFP to retain the discretion not to proceed to call up work or services is but one aspect of the analysis. [...] <sup>72</sup>

The Court of Appeal endorsed these comments, albeit with one caveat. The Court noted that it was not entirely clear that no contract B had been concluded because of the task authorization structure, and that other factors could be taken into account to infer the presence of a “bid/tender paradigm” as understood under section 47:

[5] With one caveat, we accept the analysis and conclusions of Hackland R.S.J. To the extent that his reasons may be taken to suggest that there was no “Contract B,” in the parlance of bid/

tender jurisprudence, we do not agree. In our view, it does not follow, simply because there was no final binding contract for the actual purchase and sale of IT services under the rubric of the procurement process in question, that there is no “Contract B” or that there is no “call or request for bids or tenders” as contemplated by s. 47 of the *Competition Act* on the facts. Other factors - depending upon how the evidence develops and is interpreted at trial - may lead to the conclusion the appellants and the Government intended to enter into contractual arrangements that complied with a bid/tender paradigm as the evolving jurisprudence on that concept, and s. 47, envisage.<sup>73</sup>

## **2. *R v Al Nashar et al./Industries Garanties Itée***

The bid-rigging charges in *Al Nashar* arose in the context of four private sector requests for proposals for the construction of five residential buildings located in Montreal. In its 2010 announcement, the Competition Bureau stated “that the bidders’ objective was to predetermine the winners of the contracts, while blocking competitors who were not part of the conspiracy.”<sup>74</sup> Six companies operating in the ventilation installation business and three employees were the object of a preliminary inquiry presided over by Despots J.C.Q. Unlike Alder J. in *Dowdall*, the Court of Quebec concluded that there was a total absence of evidence of an RFP under section 47 and rejected the charges.

While the Crown and defence counsel presented similar arguments, the RFPs analyzed in *Al Nashar* were different from those of *Dowdall*. In *Al Nashar*, three of the four RFPs contained a clause stipulating that the owner could reject any or all bids.<sup>75</sup> None of the RFPs contained a “task authorization” mechanism, which was contemplated in *Dowdall*. Moreover, one witness testified that for three of the construction projects, there was no obligation to accept the lower compliant bid and no guarantee that the contract would be awarded.<sup>76</sup> Another witness stated that in the private sector, the contract is not always awarded to the lowest bidder and that negotiations may occur with the two lowest bidders.<sup>77</sup>

The accused contended that the RFPs were non-binding invitations to commence negotiations and thus were not requests or calls for bids or tenders as contemplated by section 47. Three of the RFPs were

labelled as “*document d’appel d’offres*” (request for proposal document) and set out, among other things:

- a detailed procurement process (including instructions to tenderers, a precise and mandatory form, terms and conditions of the final contract and detailed specifications);
- that tenders had to be submitted in sealed envelopes;
- that questions had to be in writing;
- that tenders were irrevocable for sixty days; and
- that a performance guarantee was mandatory.

After a brief overview of the law of tenders, Despots J.C.Q. held that an RFP will not be a simple invitation to negotiate where the submission of a tender gives rise to obligations between the parties.<sup>78</sup> She commented that the fact that an RFP is detailed and contains strict performance conditions does not necessarily mean that the parties had intended to enter into contract A.<sup>79</sup> Furthermore, the Court found that the occurrence of negotiations after the opening of submissions was not a relevant factor for determining the intent of the parties.<sup>80</sup>

The Court considered the presence of a privilege clause in three of the RFPs, and the fact that two testimonies demonstrated a lack of any guarantee that a contract would be accepted, as cogent evidence that the parties had not intended to create contractual relations and that contract A had thus not been entered into. In light of its conclusion that the Crown had failed to demonstrate an intention to enter into contractual relations for all RFPs, the Court held that none was contemplated under section 47 of the Act.<sup>81</sup>

The Crown sought *certiorari* before the Superior Court of Quebec, arguing that the preliminary inquiry judge had failed to conduct a complete analysis of the evidence presented before her as required under section 548(1)b) of the Criminal Code. In *Industries Garanties*,<sup>82</sup> Vauclair J.S.C., now at the Quebec Court of Appeal, set aside the Court of Quebec’s decision, holding that Despots J. had exceeded her jurisdiction by placing her weighing of the evidence at the wrong level.<sup>83</sup> According to the Superior Court, the Crown had adduced sufficient

circumstantial evidence to allow the inferences sought by the prosecution, that is to say the intention of the parties to enter into contract A.<sup>84</sup>

Justice Vaclair held that by concluding that specific and detailed RFP documentation did not allow for the immediate conclusion that contract A had been entered into, the Court of Quebec omitted the possibility that the conclusion of contract A could indeed have occurred.<sup>85</sup> According to the Court, privilege clauses and post-selection negotiations can be useful to challenge the presence of certain aspects of the procurement process, but their appreciation is a question that falls within the jurisdiction of the trier of fact.<sup>86</sup> The Superior Court ultimately referred the matter back to the preliminary inquiry judge for redetermination. The judgment is currently being appealed.

### 3. Impact of Privilege Clauses

Tender forms and documents often stipulate that the owner does not bind himself to accept the lowest bid or any tender submitted under the RFP. Courts have referred to these types of covenants as “privilege clauses.”<sup>87</sup> Their rationale is to grant the owner a right to refuse tenders or bids, even when they are compliant, so as to avoid any obligation to enter into a contract that is not beneficial to him. For instance, a privilege clause may allow the owner to refuse tenders that result from an illegal arrangement between contractors. Courts have consistently held that privilege clauses do not negate the owner’s duty to treat all bids “fairly and equally.”<sup>88</sup>

Such a term was present in the RFP documents reviewed by the Supreme Court in *M.J.B. Enterprises*, where instructions to tenderers stated that “[t]he lowest or any tender shall not necessarily be accepted.”<sup>89</sup> The appellant M.J.B. Enterprises Ltd. argued, among other things, that an implicit term to accept the lowest bid could be implied from the presumed intention of the parties. Justice Iacobucci rejected this argument, but nonetheless recognized the existence of an implicit term that only a compliant bid would be accepted. Having regard to the privilege clause, the Court added that it did not override the implied undertaking to accept only compliant tenders, as it found both were compatible:

[45] I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation. [...] In other words, the decision to reject the “low” bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

[46] Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of “cost” than the prices quoted in the tenders. [...] However, needing to consider “cost” in this manner does not require or indicate that there needs to be a discretion to accept a non-compliant bid.<sup>90</sup>

We are of the view that the mere insertion of a privilege clause should not in itself negate the formation of contract A and automatically lead to the conclusion that s. 47 of the Act is inapplicable. Privilege clauses can actually form one of the terms of contract A. To that effect, the Supreme Court’s comments in *M.J.B. Enterprises* are particularly relevant:

[44] [...] the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.<sup>91</sup>

A privilege clause was also present in the RFPs analyzed by the Supreme Court in *Martel Building*, *Double N Earthmovers* and *Tercon Contractors*. In those three cases, the Court concluded that the parties had intended to initiate contractual relations and thus, that contract A had been entered into. As the Ontario Superior Court observed in *R. v Dowdall*, the presence of a privilege clause is but one aspect of the analysis.<sup>92</sup> The Superior Court of Quebec also recognized their usefulness to determine whether the procurement process is an RFP under section 47.<sup>93</sup>

While not determinative, a clearly worded privilege clause constitutes one of several factors that may, in certain cases, militate in favour of the fact that a procurement process is a non-binding invitation to commence negotiations rather than an RFP under s. 47. In contractual cases, courts have sometimes considered privilege clauses as an indication that contract A had not been entered into.<sup>94</sup> In all cases, the substance of the tender documents and the intention of the parties remain the paramount factors.

The negative financial impacts of bid-rigging are not necessarily eliminated by the fact that the owner has no obligation to accept a valid bid. The submission of almost identical bids may raise doubts as to the integrity of the contractors and persuade the owner to reject the bids or cancel the procurement process by virtue of the privilege clause, but a more carefully conducted bid-rigging scheme may still deceive the owner into concluding an economically inefficient contract. Concluding that the mere inclusion of a privilege clause precludes the application of s. 47 on the ground that the tender process would not constitute an RFP could lead to absurd consequences. Owners could be prompted to remove privilege clauses from their RFP documents so as to prevent collusion. This would be an undue constraint on commercial practices and freedom of contract. The inclusion of a privilege clause must not constitute a license to commit bid-rigging.

#### **4. Relevant Factors and the Impact of Negotiations**

While useful to determine aspects which are generally found in RFPs, principles developed in the jurisprudence on the law of tendering must be applied with a certain amount of caution. In the landmark Supreme Court cases dealing with the contract A/contract B analysis, the issue was not to determine whether a “call or request for bids or tenders” had taken place between the parties. The issues rather related to questions such as whether the owner had an obligation to accept the lowest bid, the parties had entered into a binding agreement, or a duty of fairness had been breached in the tender process. The characterization of the procurement process as a “call or request for bids or tenders” is not an issue that courts have had to deal with in contractual disputes. Furthermore, the contract A/contract B framework is not a strictly

imposed condition of validity, but simply an explanation of the contractual relationship between the parties.<sup>95</sup>

Interestingly, in older bid-rigging decisions such as *Charterways* (1981), *Travelways* (1982), and *Coastal Glass* (1986), the courts did not refer to the law of tenders to determine whether the procurement process qualified as an RFP under section 47. However, *Charterways* appears to be the only one in which the qualification of the procurement process as an RFP was a central matter in dispute. It appears that the use of principles of the law of contracts is a recent “innovation” brought by *Dowdall* and *Al Nashar/Industries Garanties*. The fact that courts used to be able to apply section 47 of the Act without referring to the contract A/contract B paradigm provides further evidence that it should not be applied mechanically in bid-rigging cases.

In *Charterways*, the Ontario High Court of Justice convicted a transportation company of bid-rigging under section 32.2 of the *Combines Investigation Act*<sup>96</sup> (as the Act was then known) for having arranged or agreed to submit identical tenders to a school board who had invited contractors to submit tenders for a student transportation services contract. The Court made no reference whatsoever to the law of tendering (which may in part be explained by the fact that *Ron Engineering* was rendered only four months prior).

Defence counsel argued that the call for tenders was not an RFP as contemplated under section 32.2, but rather “an invitation to commence negotiations.”<sup>97</sup> While the owner had indeed entered into negotiations with tenderers, the Court nonetheless concluded that “the fact that negotiations usually followed the opening of such bids to arrive at compromises does not prevent the acts of Mrs. Britten from constituting a call or request for tenders.”<sup>98</sup> To arrive at such a conclusion, the Court took into account the conditions of the tender call stipulated in a letter sent to tenderers, which provided, *inter alia*, a fixed time frame to submit tenders and an obligation to seal tenders. DuPont J. also noted that the representative of the owner, Mrs. Britten, had “advertised for tenders for the benefit of the public” and that all tenderers had complied with the time frame and sealing obligations.<sup>99</sup>

To support its argument that the procurement process was “merely a step in negotiations,” the defence also contended that the tender

submitted lacked sufficient detail, namely that it did not indicate the number of buses or routes to be serviced by the contractor. The Court rejected this argument and inferred the presence of an RFP based on the following factors:

- The bus operators had had dealings with the school board in the past and there was a certain understanding as to implied terms in the invitation for tender. It was understood from past practice that the companies were tendering on the same routes as the previous year, and that the number of buses was to be determined at a later date following the tender call; and
- There were “detailed conditions of tendering and the general conditions enclosed in the invitation for tender.”<sup>100</sup>

Furthermore, negotiations were possible, but not necessary. The parties had admitted “to the possibility of an award being granted on a bid which would, without negotiations, meet the budget requirement of the board.”<sup>101</sup> Consequently, the procurement process was definitely not a mere invitation to commence negotiations, as it provided a sufficiently detailed structure and conditions and was therefore capable of resulting in an award without the need for negotiations.

The criminal case law has also determined that the terms “bid” and “tender” should not be interpreted too narrowly. For instance, they could, depending on the circumstances, be able to encompass price quotations submitted under requests for quotations. In *Coastal Glass*, the British Columbia Court of Appeal indicated that the words “bid” and “tender” are capable of broad interpretation:

[8] The words “bid” and “tender” are capable of being defined as the trial judge defined them. However, it is plain that the word “bid” is also capable of a broader meaning. This is illustrated by the fact that in the course of the proceedings many witnesses and the judge in his reasons referred to the price quotations at issue in counts 2 and 4 as bids.<sup>102</sup>

Under the jurisprudence in respect of the law of tendering, a typical RFP can generally be described as “an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the contractor.”<sup>103</sup> An RFP will generally involve (a) an offer to

evaluate tenders submitted in compliance with an invitation to submit tenders and (b) the irrevocable undertaking to enter into a contract where a valid tender has been accepted. In *MJB Construction* and *Martel Building*, the Supreme Court respectively found implicit terms that the owner had to (1) accept only a compliant tender<sup>104</sup> and (2) be fair and consistent in its assessment of the tenders submitted.<sup>105</sup> Courts may consider such implied terms as evidence of a bid/tender paradigm under s. 47 of the *Act*.

However, we are of the view that section 47 of the *Act* has a broader scope. Courts should look for the presence of a “bid/tender paradigm”<sup>106</sup> rather than strictly apply the principles developed under the law of tenders. The fact that contract A or contract B has or has not actually been entered into is irrelevant. Section 47 contains no indication that the RFP or bid-rigging scheme must have succeeded. Where no tender is presented or none is accepted, tenderers who agree not to submit bids may still commit the offence of bid-rigging. In such cases, courts may consider the sole intention of the owner to enter into contractual relations upon receipt of valid tenders as a sufficient indication that the procurement process qualifies as an RFP. As the Court of Appeal noted in *Dowdall*, the formation of a final binding agreement is not necessary for an RFP under section 47 to have occurred:

[5] [...] In our view, it does not follow, simply because there was no final binding contract for the actual purchase and sale of IT services under the rubric of the procurement process in question, that there is no “Contract B” or that there is no “call or request for bids or tenders” as contemplated by s. 47 of the *Competition Act* on the facts. Other factors – depending upon how the evidence develops and is interpreted at trial – may lead to the conclusion the appellants and the Government intended to enter into contractual arrangements that complied with a bid/tender paradigm as the evolving jurisprudence on that concept, and s. 47, envisage.<sup>107</sup>

In our view, while a mechanical application of the contract A/contract B scheme should be avoided, the quintessential condition for the creation of contract A, namely the intention to enter into contractual relations, is a telling indication as to the presence of a “call or request for bids or tenders” as contemplated by section 47.

The possibility that the simplest form of contract A could have arisen as a result of the procurement process should thus be relevant to determining the presence of an RFP in bid-rigging cases.

The existence of contract A or the possibility that it could have arisen should be assessed following a “detailed analysis of the dealings between the parties.”<sup>108</sup> Contract A does not necessarily imply the irrevocable obligation to enter into contract B. As the Supreme Court observed in *M.J.B. Enterprises*, it is a sufficient corollary term for the formation of contract A that the person who placed the RFP undertook to consider the bids submitted:

[23] As I have already mentioned, whether or not Contract A arose depends upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. In the present case I am persuaded that this was the intention of the parties. At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. [...] The submission of the tender is good consideration for the respondent’s promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the Bid Security. [...] <sup>109</sup>

To qualify as an RFP, the invitation process should also impose a certain structure and obligations upon the parties. There must be more than a simple “invitation to negotiate,” but the procurement process does not have to fit within a tight contract A/contract B scheme with conditions such as irrevocable tenders, the obligation to enter into contract B, or an undertaking to accept the lowest valid bid.

In contract law decisions, courts have recognized that fixed and detailed provisions are relevant indicia that contract A arose as a result of dealings between the parties.<sup>110</sup> Detailed conditions have also been considered as a possible indication of the presence of an RFP for bid-rigging charges.<sup>111</sup> In a non-binding invitation to negotiate, the entering into of the final contract will stem mainly from negotiations rather than the tender process itself. However, the possibility or occurrence of negotiations should not in itself negate the presence of an RFP under section 47. The submission of a valid tender does not

have to be the final step of the procurement process for there to be a “call or request for bids or tenders.”<sup>112</sup> The more that the fundamental aspects and criteria of the procurement process and final contract are standardized and made non-negotiable, the more likely that the parties will have intended to give rise to contractual relations upon the submission of a tender.

On the other hand, where the procurement process sets out very few obligations upon proponents, lacks detail and structure, is loosely drafted and provides for a possibility to fully negotiate essential elements of the final contract, the likelihood that contract A will arise is greatly reduced. For instance, in *Tercon Contractors*, the Supreme Court held that despite a constrained negotiation, the parties had entered into contract A, since such negotiation did not affect fundamental details:

[20] In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.<sup>113</sup>

The only condition for the creation of contract A is the parties' intention to initiate a contractual relationship upon the submission of a tender. Its express terms and implied terms will vary depending upon the specific circumstances of each case and industry practices. Without such intention, the procurement process is more likely to qualify as a non-binding invitation to commence negotiations, which cannot fall, in our view, under section 47 of the *Act*. There must be a minimal element of enforceability at the submission stage, which can be fulfilled by the formation of contract A. While the Supreme Court has clearly observed that contract A does not always arise in the contractual context,<sup>114</sup> we are of the view that where there is no intention to enter into contractual relations upon the submission of a tender, there can be no RFP as understood under section 47. This view finds support in the comments of Hackland J. in *Dowdall*:

[35] In my opinion, the court's reasons in *Tercon* suggest that in order for a bidding contract (Contract A) to exist, the parties must be found to have intended to enter into contractual relations with respect to the proposal. Only then will the proposal constitute a bid or tender. On the other hand, such an intention will likely not be inferred when there is no specific project and no likelihood that work will be awarded to any of the successful proponents. In the court's words, "the fundamental details... of the ultimate contract" must be known.<sup>115</sup>

## V. Conclusion

Courts have recognized that the law of tendering provides useful indications as to what a "call or request for bids or tenders" should consist in for the purpose of section 47 of the *Act*. However, just as the contract A/contract B paradigm is not an artificial condition that courts must apply mechanically in contractual disputes, a strict contract A/contract B framework does not have to be satisfied to conclude that a procurement process is an RFP as per section 47.

In our view, courts should generally infer the existence of a "call or request for bids or tenders" under section 47 of the *Act* in the presence of (a) an offer to evaluate bids or tenders presented in compliance with a sufficiently structured and detailed procurement process, (b) the parties' intention to initiate contractual relations upon the submission of a bid or tender, and (c) the lack of a possibility to negotiate the fundamental details of the procurement process and final contract.

Courts should look into all of the relevant evidence, which includes both implied and explicit terms of the procurement process. The terms and conditions of the tender documents, correspondence, testimonies, custom, industry and past practice between the parties may all be germane to the determination of whether the parties intended to enter into contractual relations. Based on the jurisprudence in respect of the law of tendering and bid-rigging cases, we believe that the following indicia may be relevant for determining that a procurement process qualifies as a "call or request for bids or tenders" as contemplated under section 47 of the *Act*:

- an intention to enter into contractual relations upon the submission of a tender;
- an implied or express condition that the owner may only accept a compliant tender;
- an implied or express condition that the owner be fair and consistent in the procurement process;
- a detailed, structured and nonnegotiable submission process (e.g. time frames);
- strict tender validity conditions;
- tender irrevocability;
- anonymity of tenderers (e.g. sealed bids);
- detailed specifications and evaluation criteria;
- an obligation to provide a security as part of the tendering process; and
- lack of an option to negotiate the essential terms of the final contract after selection.

Notwithstanding the foregoing, the characterization of a procurement process as an RFP under section 47 remains a question of mixed law and fact that will vary upon the unique circumstances of each case. It will be interesting to see to what extent the trial judge in *Dowdall*, now seized of the matter, will refer to the law of tendering and the contract A/contract B framework to decide whether or not bids or tenders were submitted in response to a “call or request for bids or tenders.”

### Endnotes

<sup>0</sup> The French version of this article follows the English.

<sup>1</sup> RSC 1985, c C-34 [*Competition Act*].

<sup>2</sup> *Ibid*, s 47(1)(a)(b).

<sup>3</sup> *Ibid*, s 47(1).

<sup>4</sup> *Ibid*, s 47(3).

<sup>5</sup> *Ibid*, s 47(2).

<sup>6</sup> *Criminal Code*, RSC 1985, c C-46, s 22.2.

<sup>7</sup> SC 2012, c 1.

- <sup>8</sup> The amendments are not retroactive as per s 11(i) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- <sup>9</sup> *Canada v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at para 56.
- <sup>10</sup> *R v Yazaki Corp.*, 235 ACWS (3d) 670, 2013 CarswellOnt 15673 (WL Can).
- <sup>11</sup> Officially the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*.
- <sup>12</sup> 2013 ONCA 196, 107 WCB (2d) 91, 2013 CarswellOnt 3600 (WL Can) [Dowdall].
- <sup>13</sup> *Ibid* at para 6 [emphasis added].
- <sup>14</sup> *R v Al Nashar et al.* (1 February 2013), 500-73-0035350-104, 500-73-0035350-102 (QC CQ) [Al Nashar].
- <sup>15</sup> *R v Industries Garanties ltée*, 2014 QCCS 1582 [Industries Garanties].
- <sup>16</sup> *Ibid* at paras 21-22.
- <sup>17</sup> *R v Charterways Transportation Ltd.*, 32 OR (2d) 719, 123 DLR (3d) 159, 60 CCC (2d) 510, 57 CPR (2d) 230, 1981 CarswellOnt 1226 (WL Can) at para 73 [Charterways].
- <sup>18</sup> *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 at para 41 [M.J.B. Enterprises].
- <sup>19</sup> *R v Rowe*, 2003 CanLII 64246 (ON SC) at para 17.
- <sup>20</sup> *Charterways*, *supra* note 17 at para 73.
- <sup>21</sup> *Ibid* at para 74; *R v McLellan Supply Ltd.*, 69 AR 132, 12 CPR (3d) 53, 1986 CarswellAlta 512 (WL Can) at para 23.
- <sup>22</sup> *Charterways*, *supra* note 17 at para 74.
- <sup>23</sup> *Supra* note 17.
- <sup>24</sup> *Ibid* at para 17.
- <sup>25</sup> *R v Coastal Glass & Aluminium Ltd.*, 1986 CanLII 1160 (BC CA) at para 12 [Coastal Glass].
- <sup>26</sup> *Ibid.*
- <sup>27</sup> *Ibid* at para 4.
- <sup>28</sup> *Ibid* at para 18.
- <sup>29</sup> *R v Bugdens Taxi*, 2006 CanLII 31901 (NL PC), application for *certiorari* with mandamus in aid declined and denied: 269 Nfld & PEIR 233, , 817 APR 233, 54 MVR (5th) 282, 2007 CarswellNfld 286 (WL Can), (bid-rigging); *R v Cominco Ltd.*, 1979 CanLII 1196 (AB QB) at para 37 (price fixing).
- <sup>30</sup> *Charterways*, *supra* note 17 at para 73.
- <sup>31</sup> *Ibid* at para 55; *R v Travelways School Transit Ltd.*, 1982 CarswellOnt 1353 at para 6 (ON CA) [Travelways].
- <sup>32</sup> *Travelways*, *supra* note 31 at para 6.
- <sup>33</sup> *The Queen (Ontario) v Ron Engineering*, [1981] 1 SCR 111 [Ron Engineering]; *M.J.B. Enterprises supra* note 18; *Martel building Ltd. v Canada*, 2000 SCC 60, [2000] 2 SCR 860 [Martel Building], *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 SCR 943, *Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3, [2007] 1 SCR 116 [Double N Earth Movers]; *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69 [Tercon Contractors].

<sup>34</sup> *Ron Engineering*, *supra* note 33.

<sup>35</sup> *Ibid* at para 121.

<sup>36</sup> *Calgary (City) v Northern Construction Company Division*, 1985 ABCA 285 at para 27, aff'd [1987] 2 SCR 757.

<sup>37</sup> *Revêtements Alexander Craig Inc. v Société de construction D.C.L. ltée*, 1997 CanLII 10481 (QC CA).

<sup>38</sup> *Supra* note 18.

<sup>39</sup> *Ibid* at para 19 [emphasis added].

<sup>40</sup> *Dowdall*, *supra* note 12.

<sup>41</sup> *Industries Garanties*, *supra* note 15 at para 23.

<sup>42</sup> *M.J.B. Enterprises*, *supra* note 18 at para 44.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Mellco Developments Ltd. v Portage La Prairie (City)*, 2002 MBCA 125, 222 DLR (4th) 67, at para 38 [*Mellco Developments* cited to MBCA].

<sup>45</sup> *Double N Earthmovers*, *supra* note 33 at para 30.

<sup>46</sup> *Ibid* at para 2.

<sup>47</sup> *Ron Engineering*, *supra* note 33 at paras 122-23.

<sup>48</sup> *Supra* note 18 at para 17.

<sup>49</sup> *Supra* note 33.

<sup>50</sup> *Ibid* at paras 2-3.

<sup>51</sup> 2003 CanLII 9258 (ON SC) [*Buttcon*].

<sup>52</sup> *Ibid* at para 33.

<sup>53</sup> *Ibid* at para 34.

<sup>54</sup> *Ibid* at para 36.

<sup>55</sup> *Ibid* at para 49 [emphasis added].

<sup>56</sup> *Ron Engineering*, *supra* note 44.

<sup>57</sup> *Ibid* at paras 73-74 [emphasis added].

<sup>58</sup> *Tercon Contractors*, *supra* note 33 at para 17.

<sup>59</sup> Competition Bureau of Canada, "Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts" (17 February 2009), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02984.html>>.

<sup>60</sup> *Ibid*.

<sup>61</sup> *R v Dowdall*, 2013 ONCA 196, leave to appeal to SCC refused, 2013 CarswellOnt 13696 (WL Can), 2013 CarswellOnt 13697 (WL Can) (October 3, 2013).

<sup>62</sup> *R v Dowdall*, 2012 ONSC 3945, 219 ACWS (3d) 810, 103 WCB (2d) 557, 2012 CarswellOnt 9939 at para 36 [*Dowdall SC*].

<sup>63</sup> *R v Dowdall* (11 October 2011), (unreported), at para 80 (ONCJ).

<sup>64</sup> *Ibid* at para 81.

<sup>65</sup> *Ibid* at para 80.

<sup>66</sup> *Ibid* at para 77.

<sup>67</sup> *Ibid* at paras 88-89.

<sup>68</sup> *Dowdall SC*, *supra* note 62 at para 27.

<sup>69</sup> *Ibid* at para 22.

<sup>70</sup> *Ibid* at para 36.

<sup>71</sup> *Ibid* at para 38.

<sup>72</sup> *Ibid* at para 39 [emphasis added].

<sup>73</sup> *Dowdall*, *supra* note 12 at para 5 [emphasis added].

<sup>74</sup> Competition Bureau of Canada, “Charges Laid in Residential Construction Bid-Rigging Scheme in Montreal” (21 December 2010), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03327.html>>.

<sup>75</sup> *Al Nashar*, *supra* note 14 at para 83.

<sup>76</sup> *Ibid* at para 24.

<sup>77</sup> *Ibid* at para 48.

<sup>78</sup> *Ibid* at para 79.

<sup>79</sup> *Ibid* at para 81.

<sup>80</sup> *Al Nashar*, *supra* note 14 at para 82.

<sup>81</sup> *Ibid* at paras 85, 88-89.

<sup>82</sup> *Industries Garanties*, *supra* note 15.

<sup>83</sup> *Ibid* at para 21.

<sup>84</sup> *Ibid* at para 23.

<sup>85</sup> *Ibid* at para 21.

<sup>86</sup> *Ibid*.

<sup>87</sup> *M.J.B. Enterprises*, *supra* note 18 at para 3.

<sup>88</sup> See e.g. *Martel Building*, *supra* note 33 at para 89, *Double N Earthmovers*, *supra* note 33 at para 32, *Tercon Contractors*, *supra* note 33 at para 67; 9075-5719 *Québec inc. v Longueuil (Ville de)*, 2012 QCCA 246 at para 6, *MYG Informatique inc. v Commission scolaire René-Lévesque inc.*, 2006 QCCA 1248 at para 35.

<sup>89</sup> *Supra* note 18 at para 3.

<sup>90</sup> *Ibid* at paras 45-46 [emphasis added].

<sup>91</sup> *Ibid* at para 44 [emphasis added].

<sup>92</sup> *Dowdall SC*, *supra* note 62 at para 39.

<sup>93</sup> *Industries Garanties*, *supra* note 15 at para 23.

<sup>94</sup> *Buttcon*, *supra* note 51 at para 48; *Leeds Transit Sales Ltd. v Ottawa (City)*, 2004 CanLII 31377 (ON SC) at paras 26, 28.

<sup>95</sup> *Tercon Contractors*, *supra* note 33 at para 17.

<sup>96</sup> RSC 1985, c 19 (2nd Supp).

<sup>97</sup> *Charterways*, *supra* note 17 at para 36.

<sup>98</sup> *Ibid* at para 40.

<sup>99</sup> *Ibid* at para 39.

<sup>100</sup> *Ibid* at paras 45-46 [emphasis added].

<sup>101</sup> *Ibid* at para 30.

<sup>102</sup> *Supra* note 25 at para 8 [emphasis added].

<sup>103</sup> *M.J.B. Enterprises*, *supra* note 18 at para 37.

<sup>104</sup> *Ibid* at para 30.

<sup>105</sup> *Martel Building*, *supra* note 33 at para 88.

<sup>106</sup> *Dowdall*, *supra* note 12 at para 5.

<sup>107</sup> *Ibid* [emphasis added].

<sup>108</sup> *Tercon Contractors*, *supra* note 33 at para 19.

<sup>109</sup> *M.J.B. Enterprises*, *supra* note 18 at para 23 [emphasis added].

<sup>110</sup> *Tercon Contractors*, *supra* note 33 at para 19.

<sup>111</sup> *Charterways*, *supra* note 17 at para 46.

<sup>112</sup> Competition Act, s. 47(1)(b).

<sup>113</sup> *Tercon Contractors*, *supra* note 33 at para 20 [emphasis added].

<sup>114</sup> *M.J.B. Enterprises*, *supra* note 18 at para 17.

<sup>115</sup> *Dowdall SC*, *supra* note 62 at para 35 [emphasis added].